MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

SUPREME COURT TO HEAR FIRST ORAL ARGUMENTS OF 2009-10 TERM
Headlee Amendment case to be heard in Old Courtroom in Capitol Building

LANSING, MI, October 5, 2009 – An alleged violation of the Headlee Amendment is at stake in *Adair v State of Michigan*, the first case that the Michigan Supreme Court will hear in oral arguments this week.

The Court's seven Justices will hear *Adair* tomorrow at 9:30 a.m. in the Old Courtroom in the Capitol. The Court will then adjourn and resume hearing oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice.

The *Adair* plaintiffs sued the state in the Michigan Court of Appeals, claiming that state-mandated data collection and reporting requirements for local school districts violate the Headlee Amendment because the state did not provide needed additional funding. The state argues that it complied with Headlee by providing discretionary funding to school districts, which then used the funds to comply with the new requirements. But the Court of Appeals rejected that claim, finding a Headlee violation because the legislature did not appropriate any categorical funding for the costs associated with the state's requirements. Although the school districts presented little evidence that they incurred actual additional costs, they established a Headlee claim by showing that school districts diverted significant local resources to comply with the new requirements, the appellate court said. But the Court of Appeals denied the plaintiffs' request for costs and attorney fees. Under the Headlee Amendment, such costs are properly awarded if "the suit is sustained," but because the plaintiffs had prevailed on only one of their many claims, the Court of Appeals ruled that this requirement had not been satisfied. Both the plaintiffs and the defendant appeal.

The Court will also hear oral arguments in *Insurance Institute of Michigan v Insurance Commissioner*, in which the plaintiffs, a group that includes insurance companies and individual customers, challenge administrative rules aimed at prohibiting insurance scoring, the practice of using consumer credit report scores to set personal insurance rates. The circuit court held that the administrative rules were illegal and invalid, but the Court of Appeals vacated that ruling in a 2-1 opinion, although the judges in the majority did not agree on reasoning. All parties in the case have appealed.

The remaining six cases that the Supreme Court will hear present contract, criminal, civil procedure, due process, statutory interpretation, and family law issues.

Court will be held on **October 6 and 7, beginning at 9:30 a.m.** The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, October 6
Morning Session – Old Supreme Court Chambers, Capitol Building

ADAIR, et al. v STATE OF MICHIGAN (case nos. 137424, 137453)
Attorney for plaintiffs Daniel Adair, et al.: Dennis R. Pollard/(248) 258-2850
Attorney for defendant State of Michigan: Timothy J. Haynes/(517) 373-7700
Court: Court of Appeals
At issue: The plaintiffs, a group of public school districts, sued the state of Michigan in the Court of Appeals. The plaintiffs contended that the state violated the Headlee Amendment by, among other things, imposing data collection and reporting requirements on local school districts without funding the increased costs of those mandates. A court-appointed special master ruled in the plaintiffs' favor; the Court of Appeals agreed with that ruling and granted the plaintiffs a declaratory judgment. But the appellate court denied the plaintiffs' motion for attorney fees. The plaintiffs and the state of Michigan both appeal. Does the Headlee Amendment's prohibition of unfunded mandates (Const 1963, art 9, § 29) require the plaintiffs to prove that they incurred specific costs? Are the plaintiffs entitled to recover the costs of their lawsuit pursuant to Const 1963, art 9, § 32?
Background: In 2000, the plaintiffs, a group of school districts, filed an original action against the state of Michigan in the Court of Appeals. They contended that the legislature had violated the Headlee Amendment by failing to fund various new educational activities and services. The Headlee Amendment prohibits the legislature from requiring any new or increased service (beyond that required by existing state law) from a unit of local government, "unless a state appropriation is made and disbursed to pay the unit of local government for any necessary increased costs." Const 1963, art 9, § 29. Many of the plaintiffs' claims were dismissed.

This appeal involves the plaintiffs' remaining Headlee claim. MCL 388.1752 requires local school districts to report certain data in order to obtain funding. Through an executive order issued in 2000, the state consolidated various information gathering functions in a central data repository, the Center for Educational Performance and Information (CEPI). CEPI then created four separate electronic databases, each of which imposes special data gathering and reporting requirements on local school districts. The plaintiffs claimed that, through CEPI, the state improperly shifted its data-keeping function to the local level without providing necessary additional funding.

The Court of Appeals appointed a special master to review the evidence. Analyzing CEPI's impact on local school districts, the special master concluded that, "[t]hrough the implementation of the databases, the state is requiring the districts to actively participate in collecting, maintaining and reporting data that the state requires for (only) its own purposes."

While the plaintiffs presented little evidence that the school districts had incurred actual additional costs, this was not fatal to their Headlee claim, the special master said, because the plaintiffs did establish that the school districts diverted significant local resources to comply with the new requirements. The state argued that it had complied with Headlee by providing significant discretionary funding to the local districts, which the plaintiffs had used to comply with the CEPI requirements. But the special master rejected that argument, ruling in the plaintiffs' favor.

In a published opinion, the Court of Appeals adopted the special master's opinion and findings of fact with a few modifications. The court agreed that, in order to meet their burden of showing a Headlee Amendment violation, the plaintiffs only needed to demonstrate that the state mandated a new level of activity and failed to provide funding for the necessary costs. The Court of Appeals adopted the special master's findings regarding CEPI and the increased demands that it placed on local districts. The Court of Appeals also rejected the state's claim that it met its obligation to the plaintiffs by providing discretionary funding. Because the legislature did not appropriate any categorical funding for the CEPI-associated costs, the appeals court concluded that the state had failed to provide the necessary costs associated with these requirements. The Court of Appeals denied the plaintiffs' request for costs and attorney fees associated with prosecuting their case, reasoning that, under the Headlee Amendment, such costs are properly awarded if "the suit is sustained." Because the plaintiffs had prevailed on only one of their many claims, the Court of Appeals ruled that this requirement had not been satisfied. Both the plaintiffs and the defendant appeal.

Afternoon Session – Michigan Hall of Justice

PIERRON v PIERRON **(case no. 138824)**
Attorney for plaintiff Timothy Pierron: Scott G. Bassett/(941) 794-2904
Attorney for defendant Kelly Pierron: Beverly M. Safford/(586) 776-9500
Attorney for amicus curiae Majority of the Family Law Section of the State Bar of Michigan: Rebecca E. Shiemke/(517) 482-8933
Trial Court: Wayne County Circuit Court
At issue: The parties in this case, who divorced in 2000, have joint legal custody of their children, with the children residing most of the time with their mother in Grosse Pointe Woods, where the father also lived. When the mother moved to Howell in 2007, she decided to enroll the children in Howell schools, but the father objected. The trial court, applying a "clear and convincing evidence" standard, concluded that the attempted change disrupted the children's custodial environment with the father, and added that the mother had not satisfied her burden of proof under even the less-stringent "preponderance of the evidence" standard. But the Court of Appeals reversed in a published decision, holding that the preponderance of the evidence standard applied. The appellate court remanded the case for reevaluation of the change-of-schools issue based on up-to-date information. Did the mother's decision result in a change in the custodial environment? Does the "clear and convincing evidence" or "preponderance of the evidence" burden of proof apply? Did the mother demonstrate that the school change was in the children's best interests? Was the children's preference for the Howell school district "reasonable" for purposes of MCL 722.23(i)?
Background: Timothy and Kelly Pierron were married in October 1993 and divorced in April 2000. The divorce judgment granted both parties joint legal custody of their two children, but granted the mother physical custody, with reasonable and liberal parenting time awarded to the

father. The judgment of divorce provided that "each parent shall have equal decision-making authority with respect to matters concerning the children's education," and that "[b]oth parents shall be fully informed with respect to the children's progress in school and shall be entitled to participate in all school conferences, programs and other related activities." An amended judgment of divorce, entered in June 2001, provided the parties with joint legal custody and shared parenting time. The mother's residence continued to be the children's primary residence, but each party's residence was identified as the children's legal residence. At this time, both parents lived in Grosse Pointe Woods and the children attended the Grosse Pointe Public Schools. In 2007, the mother moved to Howell, and attempted to change the children's school district to Howell. Pursuant to MCL 722.31(1), a custodial parent may move the children's legal residence within 100 miles without the court's permission or the noncustodial parent's consent. But the custodial parent is not authorized to make a unilateral decision affecting the children's welfare, such a change in the children's school district. Where the parents disagree about a proposed change in the children's schools, courts look to the "best interests of the child" test of MCL 722.23.

After a six-day evidentiary hearing, the trial court found that the attempted change in the children's school district disrupted the children's custodial environment with their father. Applying a "clear and convincing evidence" standard, the court determined that the mother had not satisfied her burden of proving that the children should be enrolled in a different school district. The trial court added that the mother had not satisfied her burden of proof under even the less-stringent "preponderance of the evidence" standard. But the Court of Appeals reversed in a published opinion, holding that the trial court erred by finding that the proposed school change would alter the children's established custodial environment. The Court of Appeals held that the "preponderance of evidence" standard applied and said that the mother "likely" satisfied her burden of proof on the change-of-schools issue. The trial court erred in its review of several of the "best interests" factors and made several findings of fact that were against the great weight of the evidence, the appellate court stated. Accordingly, the Court of Appeals vacated the trial court's order and remanded the case for reevaluation of the schools issue based on up-to-date information. The father appeals.

PEOPLE v WILDER [(case no. 137562)]

Prosecuting attorney: Timothy A. Baughman/(313) 224-5792

Attorney for defendant Darrell Wilder: Valerie R. Newman/(313) 256-9833

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Judith B. Ketchum/(269) 383-8900

Trial Court: Wayne County Circuit Court

At issue: The defendant was charged with first-degree home invasion, MCL 750.110a(2), and other crimes. Following a bench trial, the defendant was convicted of third-degree home invasion, MCL 750.110a(4), instead of first-degree home invasion; he was also convicted of felony-firearm. The Court of Appeals concluded that the trial court erred in convicting the defendant of third-degree home invasion. Is third-degree home invasion a necessarily lesser included offense of first-degree home invasion?

Background: Darrell Wilder appeared uninvited at the victim's home. When she answered the door, Wilder entered and stated that he was taking her television because of a dispute with the victim's son. When the victim protested, Wilder showed her a gun, then left with the television. Wilder was arrested and charged, as a third habitual offender, with first-degree home invasion, felon in possession of a firearm, and felony-firearm. Wilder waived his right to a jury trial.

Following a bench trial, the trial judge convicted Wilder of third-degree home invasion and felony-firearm. The judge found that Wilder entered the victim's home without permission and removed property, and that Wilder displayed the gun at "any suggestion of resistance." Wilder appealed. Wilder argued that his right to due process was violated when the trial court convicted him of the uncharged lesser offense of third-degree home invasion. A trial court can only convict a defendant of a "lesser included" offense, Wilder argued, and the controlling inquiry is whether the lesser offense can be proved by the same facts that are used to establish the charged offense. Here, Wilder argued, third-degree home invasion cannot be proved by the same facts that would be used to establish the charged offense of first-degree home invasion, so it is a cognate offense, not a lesser included offense. The Court of Appeals agreed, vacating Wilder's convictions and sentences in an unpublished per curiam opinion. The appellate court explained, "A trial court may only consider a lesser offense if it is a necessarily included lesser offense. MCL 768.32. We find that third-degree home invasion does not comprise a necessarily lesser-included offense of first-degree home invasion." The concurring judge wrote separately to urge adoption of the rule that an "inferior" offense includes an offense designated as a lesser-degreed offense by the legislature. The prosecutor appeals.

DAVIS v FOREST RIVER, INC., et al. (case no. 136114)
Attorney for plaintiff Keith Gayle Davis: Jonathan A. Green/(248) 932-3500
Attorney for defendant Forest River, Inc.: Donald H. Robertson/(810) 579-3600
Attorney for amicus curiae General Motors Company: Frank M. DeLuca/(248) 952-5100
Attorney for amicus curiae Chrysler Group LLC: Cheryl A. Bush/(248) 822-7800
Attorney for amicus curiae Ford Motor Company: Marc D. Saurbier/(586) 447-3700
Attorney for amicus curiae Michigan Manufacturers Association: David D. Grande-Cassell/(517) 318-3100
Attorney for amicus curiae Recreation Vehicle Industry Association and National Marine Manufacturers Association: Michael D. Dolenga/(248) 478-9922
Trial Court: Ingham County Circuit Court
At issue: The plaintiff experienced multiple repair problems with a recreational vehicle he bought from a dealer. He sued the RV's manufacturer, seeking to return the vehicle and recover the purchase price. A jury found in part that the manufacturer breached its express warranty and its implied warranty of merchantability, and that the plaintiff was entitled to revoke his acceptance of the RV. The manufacturer argued that revocation of the contract was not the right remedy because the manufacturer was not a party to the purchase contract. But the Court of Appeals affirmed, finding that the plaintiff could rescind the contract even if he and the manufacturer were not in "privity of contract." Is there a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract? Do the Uniform Commercial Code and the economic loss doctrine apply? If the UCC applies, are a breach of warranty claim and revocation of acceptance available under the UCC in the absence of privity?
Background: Keith Davis bought a recreational vehicle from a dealer. After the RV was plagued by repair problems, Davis sued both the dealer and Forest River, the RV's manufacturer, under various theories of liability; Davis sought to revoke the RV's purchase and compel the defendants to pay the purchase price to him. The dealer accepted a case evaluation and was dismissed from the case; Davis and Forest River proceeded to trial. The jury found in part that Forest River had breached its express warranty and its implied warranty of merchantability, and that Davis was entitled to revoke his acceptance of the RV. The trial court entered judgment for

Davis in the amount of the purchase price of approximately $70,000; alternatively, the court ordered that, if an appellate court held that revocation of acceptance was not an available remedy under the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, then Davis was entitled to his damages of approximately $44,000. The Court of Appeals, in a split, published decision, affirmed the trial court's judgment, with a clarification. The majority held that "revocation of acceptance" is a Uniform Commercial Code remedy and not available to Davis because he and Forest River, the RV manufacturer, were not in "privity of contract." In other words, because the purchase contract was between Davis and the dealer, Davis could not revoke the contract as against Forest River. But, the majority said, Davis had the common-law equitable remedy of "rescission" – the annulment or voiding of a contract. The majority noted that "Michigan law has, for half a century, unambiguously afforded the remedy of rescission to purchasers against remote, out-of-privity manufacturers on a theory of breach of implied warranty." The dissenting judge disagreed, arguing that rescission cannot be available in the absence of privity. Forest River appeals. The Michigan Supreme Court granted leave to appeal in June 2008, heard oral argument, and then resolved this case by order in December 2008. After considering motions for reconsideration filed by both sides, the Court granted reconsideration, vacated its December 2008 order, and again granted leave to appeal.

Wednesday, October 7
Morning Session

INSURANCE INSTITUTE OF MICHIGAN, et al. v COMMISSIONER, FINANCIAL & INSURANCE SERVICES **(case nos. 137400, 137407)**
Attorney for plaintiffs Insurance Institute of Michigan, et al.: Peter H. Ellsworth/(517) 371-1730
Attorney for intervening plaintiffs Michigan Insurance Coalition and Citizens Insurance Company of America: Lori McAllister/(517) 374-9150
Attorney for defendant Commissioner, Financial & Insurance Services, Department of Labor & Economic Growth: Christopher L. Kerr/(517) 373-1160
Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland/(517) 482-4890
Attorney for amicus curiae Michigan Association of Home Builders: Gregory L. McClelland/(517) 482-4890
Attorney for amicus curiae Michigan Chamber of Commerce: Mark R. Fox/(517) 482-5800
Attorney for amicus curiae Insurance and Indemnity Law Section of the State Bar of Michigan: Deborah A. Hebert/(248) 355-4141
Attorney for amicus curiae Consumer Data Industry Association: Steven D. Weyhing/(517) 371-1400
Attorney for amicus curiae Property Casualty Insurers Association of America, et al.: Michael J. Hodge/(517) 487-2070
Trial Court: Barry County Circuit Court
At issue: The state's Insurance Commissioner promulgated administrative rules that basically prohibited insurance scoring, the use of consumer credit report scores to establish personal insurance rates. A group of insurance companies and their customers sued to stop implementation of the administrative rules. The circuit court held that the administrative rules were illegal, invalid, and unenforceable; the court issued a permanent injunction against their

use. But the Court of Appeals vacated the circuit court order. Under § 64 of the Administrative Procedures Act, MCL 24.264, are the plaintiffs permitted to bring an original declaratory judgment action in the circuit court without first having requested a declaratory ruling from the defendant? Does § 244(1) of the Insurance Code, MCL 500.244(1), provide the exclusive means of seeking judicial review of rules promulgated by the defendant? Is judicial review of the challenged administrative rules limited to the administrative record prepared during the public hearing process? Do the challenged administrative rules violate the plaintiffs' due process rights? Are they valid and enforceable under the Insurance Code? Are they arbitrary and capricious? Do they exceed the defendant's rulemaking authority?

Background: Insurance scoring – the practice of using consumer credit report scores in establishing personal insurance rates – is the subject of administrative rules promulgated by the state's Insurance Commissioner in 2005. The Commissioner formally adopted the rules, which basically prohibit insurance scoring, after the Office of Regulatory Reform certified the rules as legal. The legislature's Joint Committee on Administrative Rules objected to the rules, but the legislature did not act to prohibit their implementation. The rules were filed with the Secretary of State.

On March 29, 2005, Insurance Institute of Michigan, Hastings Mutual Insurance Co., Farm Bureau General Insurance Co. of Michigan, Frankenmuth Casualty Insurance Co., and Farm Bureau customers Walter Stafford, Jr. and Michael Flohr, filed suit in circuit court, seeking declaratory and injunctive relief. The Michigan Insurance Coalition and Citizens Insurance Co. of America intervened in the lawsuit. The plaintiffs and intervening plaintiffs alleged, among other things, that the rules would mean that discounts in premiums based on insurance scores would be eliminated; that insurance companies would have to make "sweeping changes" in their insurance policy rating plans and alterations in their base rate structures; and that customers such as Stafford and Flohr would see increases in their premiums under the rules. The plaintiffs asserted that insurance scoring had been used to calculate premiums in Michigan since 1997, that there is a strong correlation between insurance scores and risk of loss, and that the rules would require insurers to charge higher premiums to customers who present lower risk of loss, violating a basic premise of the Insurance Code.

The circuit court held that the administrative rules were illegal, invalid, and unenforceable; the court permanently enjoined the Insurance Commissioner from enforcing them. But the Court of Appeals vacated the circuit court order in a split published opinion. The panel could not agree on a rationale; each judge signed a separate opinion. Two judges concluded that the order must be vacated: one judge would have held that the circuit court erred in failing to base its decision on the administrative record, in accepting additional evidence, and in some of its conclusions on the merits. The other judge concluded that the circuit court erred in permitting the plaintiffs to maintain an original action, and she did not reach the merits. The third judge dissented, concluding that an original action was appropriate and that any error in the circuit court's creation of its own record was harmless. On the merits, the third judge agreed with the circuit court that the rules are illegal and invalid. All parties appeal.

FIRST NATIONAL BANK OF CHICAGO v DEPARTMENT OF TREASURY, et al. (case no. 137527)

Attorney for plaintiff First National Bank of Chicago, as Trustee for BankBoston Home Equity Loan Trust 1998-1: Walter J. Russell/(616) 459-7100

Attorney for defendants Michigan Department of Treasury and Michigan Department of Natural Resources: Kevin T. Smith/(517) 373-3203

Trial Court: Court of Claims

At issue: The Michigan Department of Treasury foreclosed on a property in Clinton County for non-payment of property taxes. BankBoston, which held the mortgage, had merged with Fleet National Bank and changed its name to FNB, which had a Rhode Island address. Notices of forfeiture and foreclosure proceedings were sent to the Rhode Island address, rather than to the Boston address listed on BankBoston's mortgage assignment. First National Bank, BankBoston's trustee, sued the Department of Treasury and Department of Natural Resources. First National claimed that its mortgage interest was foreclosed in violation of its due process rights, and raised a constitutional taking claim. Does First National have standing to assert BankBoston's due process rights? If so, were BankBoston's due process rights violated when notices were sent to FNB's address?

Background: A property in St. Johns became subject to foreclosure after the owners failed to pay 1999 property taxes. Notices of forfeiture and the foreclosure proceedings were sent to the original individual purchasers, the first mortgagee, the first assignee, and BankBoston. BankBoston had merged with Fleet National Bank and changed its name to FNB, which had an address in Rhode Island. BankBoston's notice was sent to the Rhode Island address, rather than to the Boston address listed on the mortgage assignments. After the foreclosure hearing, a judgment of foreclosure was issued, in the amount of $2,316, and the notice of judgment of foreclosure was recorded. The property sold at auction for $109,000. First National Bank sued, claiming that its mortgage interest was foreclosed in violation of its due process rights. The bank also alleged that the amount of money in excess of the taxes, penalties, and costs was an unconstitutional taking. The Court of Claims ruled in favor of First National, holding that it had been denied due process because the notice was not sent to BankBoston's Boston address, which was listed on the assignment and which was the address reasonably calculated to apprise BankBoston and its trustee First National of the pending hearings. The Court of Appeals affirmed in a split published opinion. The dissenting judge would have reversed because, in his view, First National Bank was not the entity that was owed, or arguably denied, due process (BankBoston was) and also because the notice in this case was adequate for due process purposes. The defendants appeal.

DEPARTMENT OF AGRICULTURE, et al. v APPLETREE MARKETING, L.L.C., et al. (case no. 137552)

Attorney for plaintiffs Michigan Department of Agriculture and Michigan Apple Committee: James J. Chiodini/(517) 349-7744

Attorney for defendants Appletree Marketing, L.L.C. and Steven Kropf: J. Scott Timmer/(616) 831-1700

Attorney for amicus curiae Michigan Asparagus Advisory Board, et al.: Stephen J. Rhodes/(517) 381-0100

Trial Court: Kent County Circuit Court

At issue: The Agricultural Commodities Marketing Act requires Michigan apple growers to pay assessments on their income from apple sales to the Michigan Apple Committee. In exchange, the committee provides marketing and research for apple producers. The defendant apple distributing company collected assessments from its customers, the apple growers, but failed to pay the assessments to the Apple Committee. The Apple Committee and the Department of Agriculture sued, seeking statutory damages under the Agricultural Commodities Marketing Act, damages for common law conversion, and treble damages for statutory conversion. Are remedies under the act exclusive? May the plaintiffs simultaneously pursue a claim under the act and a claim for statutory conversion?

Background: Appletree Marketing, L.L.C., is an apple distributing company founded by Steven Kropf, its sole member. The Michigan Apple Committee provides marketing and research programs for Michigan apple producers and sellers, pursuant to the Agricultural Commodities Marketing Act, MCL 290.651 *et seq*. The act requires apple distributors to collect payments for the apples they sell, and to deduct a designated assessment from their payments to the apple producers. Those assessments must then be paid to the Apple Committee. Appletree collected the assessments in 2004 and 2005, but failed to pay those assessments to the committee. Instead, Appletree used the assessments to pay other expenses. The Apple Committee and the Michigan Department of Agriculture sued Appletree and Kropf, alleging that Appletree had violated the Agricultural Commodities Marketing Act, and also that Kropf and Appletree were liable for common law conversion and statutory conversion. The plaintiffs moved for summary disposition, asking the trial court to award treble damages on the statutory conversion claim against both Appletree and Kropf. After a hearing, the trial court granted the plaintiffs' motion in part. The court ruled that the plaintiffs were entitled to a judgment in the amount of the assessments that Appletree deducted but did not remit, together with attorney fees, costs and audit expenses. But the plaintiffs were not entitled to treble damages, said the trial court, reasoning that "[h]ad the legislature intended a person who violated the [Agricultural Commodities Marketing Act] to pay treble damages, it would have expressly stated so." The plaintiffs appealed. The Court of Appeals affirmed the trial court in a published opinion. The plaintiffs' conversion claim was based entirely on Appletree's duty under the act to remit the deducted assessments to the Apple Committee, so the plaintiffs' statutory and common-law conversion claims would not exist without the act, the Court of Appeals reasoned. Because the act's remedies are exclusive, the Court of Appeals held, the plaintiffs were barred from seeking damages based on common law and statutory conversion. The plaintiffs appeal.

Afternoon Session

PEOPLE v FEEZEL [(case no. 138031)]

Prosecuting attorney: Mark Kneisel/(734) 222-6620

Attorneys for defendant George Evan Feezel: Douglas R. Mullkoff/(734) 761-8585, F. Mark Hugger/(734) 975-9150

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Donald A. Kuebler/(810) 257-3854

Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Christine A. Pagac/ (313) 256-9833

Trial Court: Washtenaw County Circuit Court

At issue: The defendant struck and killed a pedestrian while driving. At the time of the accident, the victim was walking in the middle of a dark road during a rainstorm. Evidence suggested that the defendant was intoxicated and had marijuana in his system. The trial judge excluded evidence that the victim was also intoxicated. Following a jury trial, the defendant was convicted of operating a motor vehicle while intoxicated, failure to stop at the scene of an accident when at fault resulting in death, and operating a motor vehicle with the presence of a schedule 1 controlled substance in the body causing death. The Court of Appeals affirmed. Did the trial judge abuse his discretion in excluding evidence of the victim's intoxication? Did the trial judge erroneously instruct the jury on the elements of failure to stop at the scene of an accident when at fault resulting in death? Was any error in the jury instructions harmless?

Background: George Evan Feezel was driving on Packard Road in Ypsilanti Township when he struck and killed a man who was walking in the road. According to evidence later presented at trial, it was dark and raining heavily at the time of the accident, and, although there was a sidewalk, the victim was walking in the middle of the road. Feezel initially left the scene of the accident, but later returned while the police were investigating and was arrested. His blood alcohol content was .07 several hours after the accident, and the prosecution's expert estimated that Feezel's blood alcohol content at the time of the accident was .091 to .115. A blood test also showed evidence of 11-carboxy-THC, which is a metabolite or byproduct created when the body breaks down THC, the psychoactive ingredient of marijuana. Feezel was charged with operating a motor vehicle while intoxicated causing death, operating a motor vehicle with the presence of a schedule 1 controlled substance (marijuana) in his body causing death, and failure to stop at the scene of an accident resulting in death.

Before trial, the prosecutor filed a motion to exclude evidence that the victim was also intoxicated, and that his blood alcohol content at the time of the accident was .286. Feezel opposed the motion, arguing that evidence of the victim's extreme intoxication was relevant to show that Feezel's conduct was not the proximate cause of the victim's death. The victim's gross negligence was a superseding cause that severed the causal link between Feezel's actions and the victim's death, Feezel contended. But the trial judge granted the prosecutor's motion and excluded the evidence.

At trial, Feezel presented expert testimony that, under the circumstances, he would not have been able to avoid hitting the victim unless he was traveling at a rate of 15 mph. The jury acquitted Feezel of operating a motor vehicle while intoxicated causing death, but convicted him of the lesser offense of operating a motor vehicle while intoxicated. The jury also convicted Feezel of failure to stop at the scene of an accident when at fault resulting in death and operating a motor vehicle with the presence of a schedule 1 controlled substance in his body causing death. The trial court sentenced Feezel as a third habitual offender to concurrent terms of one year for the operating a motor vehicle while intoxicated conviction and 7 to 30 years for the other two convictions. Feezel filed a motion for acquittal or for a new trial, which the trial court denied. Feezel appealed to the Court of Appeals, which affirmed the lower court in a split unpublished opinion. The dissenting judge concluded that the trial court erred in excluding evidence of the victim's intoxication and in failing to instruct the jury on proximate causation on the charge of operating a vehicle with a schedule 1 controlled substance in the body causing death. Feezel appeals.

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